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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 645.

BETTY LOU STRICKLAND,
EXECUTRIX OF THE ESTATE OF
SAMUEL H. SHEPPARD,
Petitioner,

vs.

THE E. W. SCRIPPS COMPANY,
LOUIS B. SELTZER,
SAMUEL R. GERBER,
Respondents.

BRIEF OF RESPONDENTS THE E. W. SCRIPPS COMPANY AND LOUIS B. SELTZER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WARREN DAANE,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

DWIGHT B. BUSS,
PARKER M. ORR,
DON H. PACE,

Attorneys for Respondents The E. W. Scripps Company and Louis B. Seltzer.

Of Counsel:

BAKER, HOSTETLER & PATTERSON,
1956 Union Commerce Building,
Cleveland, Ohio 44115.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit (Judges Peck and Combs), and the concurring opinion (Judge McCree) (Petition App. A.) are reported at 421 F.2d 555. The opinion of the District Court (Pet. App. B.) is not reported.

JURISDICTION; QUESTION PRESENTED, AND STATUTE INVOLVED.

The jurisdictional requisites and the question presented are set forth in the Petition. The statutory provision involved is Section 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. Section 1983, printed in Appendix 1, *infra*, p. 7.

PARTIAL RESTATEMENT OF THE CASE.

The Petition is incomplete and inaccurate in the following respects:

1. Samuel H. Sheppard died on April 6, 1970, while the case was still pending in the Court of Appeals. The mandate of affirmance went to the District Court on April 15, 1970. No motion for substitution has been filed in *any* court to date, and more than six months has now elapsed since the death.

2. The Petition presents no "special and important reasons" for review, as described in Rule 19 of this Court, and Petitioner claims none.

3. The decision by the Court of Appeals was unanimous; Judge McCree did *not* dissent as misstated by counsel for Petitioner on page 8 of the Petition.

4. The single "Question Presented" questions merely one of the *reasons* assigned by two of the judges of the Court of Appeals for the affirmance. The affirmed judgment is fully sustained by grounds relied upon by *both* courts below and *not* questioned by Petitioner.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

THIS ACTION DID NOT SURVIVE THE DEATH OF SAMUEL H. SHEPPARD, AND HAS ABATED.

Sheppard died on April 6, 1970, *before* the filing of the Petition For Writ Of Certiorari. No motion for substitution of parties (a requisite to revivor here and in the courts below) has been filed in any court. More than six months has elapsed since Sheppard's death. The action has abated. (*See* Rule 48 of this Court.)

Moreover, even if revivor had been attempted, this particular cause of action did not survive Sheppard's death under applicable law.[1] Non-survival of the cause of action precludes revivor of the action.[2]

Therefore, this action is not susceptible of dispositive review, and the writ should be denied. *Martin v. Baltimore and Ohio R. Co.*, 151 U.S. 673, 703.

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[1] Under federal case law and 42 U.S.C. Section 1988, reference must be had to state law to determine whether the particular Section 1983 action survives death, if indeed such causes of action ever survive. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 67-68; *Martin v. Baltimore and Ohio R. Co.*, 151 U.S. 673, 692; *Baker v. F. & F. Investment Co.*, 420 F.2d 1191, 1196 (7th Cir., 1970), *cert. denied*, 39 U.S.L.W. 3134 (U.S. Oct. 13, 1970); *Brazier v. Cherry*, 293 F.2d 401, 407 (5th Cir., 1961), *cert. denied*, 368 U.S. 921; *Pritchard v. Smith*, 289 F.2d 153, 157 (8th Cir., 1961). The allegations of this Complaint, when stripped of Section 1983 verbiage, amount to an action for malicious prosecution under Ohio law. *Rogers v. Barbera*, 170 Ohio St. 241, 244, 164 N.E.2d 162, 165 (1960). In Ohio no specific statute provides for survival of federally created or civil rights causes of action, and malicious prosecution causes of action do *not* survive the death of the plaintiff. *State ex rel. Crow v. Weygandt*, 170 Ohio St. 81, 84, 162 N.E.2d 845, 848 (1959).

[2] The substitution procedure is not available where the cause of action is extinguished by death. Fed.R.Civ.P. 25(a)(1), formerly 28 U.S.C. § 778 (1928).

II.

THE PETITION PRESENTS NO "SPECIAL AND IMPORTANT REASONS" FOR REVIEW, BUT SEEKS MERELY A REEXAMINATION OF AN ADVERSE DECISION APPLICABLE ONLY TO PETITIONER'S DECEDENT.

The Petitioner ignores the fact that certiorari has not been granted in this case and presents what amounts to a brief on the merits. No adequate reason for review is stated or attempted. The Petitioner seeks merely a re-examination of an adverse decision applicable only to Samuel H. Sheppard during his lifetime.

Moreover, Petitioner does not challenge the judgment, but merely one of the reasons assigned by two judges in affirming the judgment below.

III.

THE JUDGMENT OF THE DISTRICT COURT AFFIRMED UNANIMOUSLY BY THE COURT OF APPEALS IS CORRECT AND FULLY SUPPORTED BY GROUNDS NOT QUESTIONED BY PETITIONER AND THEREFORE IS NOT SUBJECT TO REVIEW.

The judgment affirmed by the Court of Appeals is fully sustainable on grounds not challenged by Petitioner. One such ground is that of quasi-judicial immunity, relied upon by the District Court and expressly approved by concurring Judge McCree.[3] Judges Peck and Combs found it unnecessary to examine this ground. Petitioner does not challenge its propriety.

Another ground, also *not* challenged by Petitioner, fully supports the judgment affirmed. Both courts below

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[3] Petitioner's arguments in this Court are based entirely upon the first paragraph of Judge McCree's concurring opinion but Petitioner makes no effort to challenge Judge McCree's affirmance on the ground of quasi-judicial immunity. Presumably, this results from Petitioner's erroneous belief that Judge McCree dissented when in fact he concurred in the affirmance.

held that the only persons having the power or authority under color of law to commit the constitutionally deprivative acts complained of (*i.e.*, the allegedly wrongful accusation and trial) were the grand jury which indicted, the police who arrested, the county prosecutor who prosecuted, the trial judge who presided, and the petit jury which convicted (Pet. App. A, pp. 13-14; App. B, pp. 23-25, 26-28). The Petitioner does not allege that any of the Respondents conspired with any of those persons, and the lower courts properly ruled that absent such a conspiracy a Section 1983 action could not be maintained against Respondents.

Petitioner neither questions nor argues the propriety of the foregoing holdings, either one of which is sufficient to support the entire judgment regardless of any reference to or reliance upon *Sheppard v. Maxwell*, 384 U.S. 333, by two of the appellate judges.

The narrowness of what is offered as the single issue for this Court's determination comes into sharp focus when the "Question Presented" is analyzed. Petitioner submits as the sole issue for review whether two of the appellate judges were correct in citing and relying upon the opinion in *Sheppard v. Maxwell* as a reason for their affirmance of the judgment below. The District Court did not cite or rely on *Sheppard v. Maxwell*, nor did the concurring appellate judge. But whether a Court of Appeals is correct in assigning a particular *reason* for its affirmance of a judgment fully sustainable on other grounds is not a question meriting review by this Honorable Court.[1]

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[1] A *full* reading of the opinion in *Sheppard v. Maxwell, supra*, reveals far more reason for the two appellate judges' partial reliance thereon than the Petitioner's carefully fragmented quotations and gross omissions therefrom are designed to suggest. But regardless, the overriding point is that the sole narrow issue presented by Petitioner's "Question Presented" is not dispositive.

Moreover, the only two judges citing *Sheppard v. Maxwell*, stated clearly that they would still have affirmed, *regardless of that opinion*:

> We observe, however, that even in the absence of the opinion in *Sheppard v. Maxwell, supra*, the greater weight of authority and better reasoned decisions would require us to find the lack of a cause of action. *Striker v. Pancher*, 317 F.2d 780 (6th Cir. 1963); *Cuiksa v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Dunn v. Gazola*, 216 F.2d 709 (1st Cir. 1954); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1954); *Reinke v. Walworth, County Sheriff*, 282 F. Supp. 377 (E.D. Wis. 1968); *Sinchak v. Parente*, 262 F.Supp. 79 (W.D. Pa. 1966). (Pet. App. A., p. 13)

It is clear therefore, that the single "Question Presented" by Petitioner does not offer a dispositive question for review even within this case, and certainly no question of "special and important" interest generally.

CONCLUSION.

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

WARREN DAANE,
DWIGHT B. BUSS,
PARKER M. ORR,
DON H. PACE,
Attorneys for Respondents
The E. W. Scripps Company
and Louis B. Seltzer.

Certiorari was denied in *Cuiksa v. City of Mansfield*, 356 U.S. 937, and in *Whittington v. Johnston*, 346 U.S. 867.

APPENDIX 1.

42 U.S.C. § 1983.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.